

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:22-cv-0068-BO

YOLANDA IRVING, individually and as the
natural parent and guardian of J.I., JUWAN
HARRINGTON, CYDNEEA
HARRINGTON, KENYA WALTON
individually and as the natural parent and
guardian of R.W., ZIYEL WHITLEY,
DYAMOND WHITLEY, KAMISHA
WHITLEY, NANETTA GRANT as the natural
parent and guardian of Z.G., and
EMANCIPATE NC, INC.,

Plaintiffs,

v.

THE CITY OF RALEIGH, Officer OMAR I.
ABDULLAH, Sergeant WILLIAM ROLFE,
Officer RISHAR PIERRE MONROE, Officer
JULIEN DAVID RATTELADE, and Officer
MEGHAN CAROLINE GAY, Officer DAVID
MEAD, Officer JESUS ORTIZ, Officer KYLE
PERRIN, Officer MICHEAL MOLLERE,
Officer KYLE THOMPSON, Officer
VINCENT DEBONIS, Officer DANIEL
TWIDDY, Officer THOMAS WEBB, Officer
DAVID MCDONALD, Officer DAVID
GARNER, Chief of Police ESTELLA
PATTERSON and City Manager MARCHELL
ADAMS-DAVID, in their official capacities.

Defendants.

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO STRIKE
DEPOSITION TESTIMONY**

Plaintiffs, by and through undersigned counsel hereby submit the below brief in support of their motion to strike or disregard the deposition testimony attached by SEU Defendants to their reply brief filed in support of their motion to dismiss.

ARGUMENT

Because the SEU Defendants' 12(b)(6) motion challenges the substantive merit of Plaintiffs' excessive force claims, the deposition testimony attached by Defendants to their reply brief should be stricken or not considered by this Court. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (“[A]s a general rule extrinsic evidence should not be considered at the 12(b)(6) stage”). Or, in the alternative, the Court should convert the SEU Defendants' motion to one for summary judgment and set a briefing schedule to permit the parties to appropriately present evidence and fully address the issue. *Vaitkuviene v. Syneos Health, Inc.*, No. 5:18-CV-29-H-KS, 2020 WL 5742714, at *5 (E.D.N.C. Aug. 7, 2020), *report and recommendation adopted in part, rejected in part*, No. 5:18-CV-29-FL, 2021 WL 3856452 (E.D.N.C. Aug. 30, 2021) (“Generally, when a court considers documents outside the pleadings at the motion to dismiss stage, it converts the motion to one for summary judgment . . . Therefore, a court considering a motion to dismiss “should focus [its] inquiry on the sufficiency of the facts relied upon by the plaintiffs in the complaint.” *Zak*, 780 F.3d at 606.”).

SEU Defendants, on October 18, 2022, filed a motion to dismiss Claim 8 (excessive force) pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 129. Plaintiffs filed a response to Defendants' motion to dismiss on November 22, 2022. ECF No. 142. Defendants

filed their reply brief on December 6, 2022. ECF No. 145. Defendants' reply brief included deposition testimony from one Plaintiff, Yolanda Irving. *Id.* This testimony was attached as Exhibit A to Defendants' reply brief. *Id.*

This Court should either strike the testimony or set a summary judgment briefing schedule where the parties are permitted to present evidence on all ten individual Plaintiffs claims for excessive force. Plaintiffs submit exhibit A as a partial description of SEU Defendants' excessive force. Attached as Exhibit B is the Body Camera footage of the raid on Plaintiffs' homes. Both exhibits are provisionally filed under seal.

Importantly, this Court has scheduled discovery to end on March 3, 2023 and set a deadline of dispositive motion practice for March 31, 2023.

CONCLUSION

Plaintiffs respectfully request this Court strike the deposition testimony attached to SEU Defendants' reply brief or convert the motion to one for summary judgment and permit the Plaintiffs to present evidence and respond appropriately.

This the 13th day of February 2023

Respectfully,



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Served on all parties: Via ECF